IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR
&
THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

RCRev..No. 369 of 2005()

RCA.68/2004 of V ADDL. DISTRICT COURT, ERNAKULAM
RCP.38/2003 of I ADDL.M.C., RENT CONTROL, ERNAKULAM
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REVISION PETITIONER

DUNLOP INDIA LIMITED, KINGS COURT,
46/B CHOWRANGI ROAD, CALCUTTA REPRESENTED
BY ITS AUTHORIZED AGENT, REPRESENTATIVE & MANAGER
OPERATIONS, KERALA SMT.BEENA KOSHY.

BY ADV. SRI.BABU KARUKAPADATH

RESPONDENTS:
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1. A.A.SULAIMAN, AGED 55, S/O.LATE
A.B.ABDUL KHADER, ALUMKAPARAMBIL HOUSE,
CHITTOOR ROAD, ERNAKULAM.

2. A.A.SIYAD, AGED 51, S/O.A.B.ABDUL KHADER
ALUMKAPARAMBIL HOUSE, CHITTOOR ROAD,
ERNAKULAM.

3. A.A.SUHOOD, AGED 38, S/O.LATE
A.B.ABDUL KHADER, ALUMKAPARAMBIL HOUSE,
CHITTOOR ROAD, ERNAKULAM.

R2 BY ADV. SRI.S.SREEKUMAR
R1 & R3 BY ADV. SRI.VARGHESE C KURIAKOSE

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 4/12/2006, THE COURT ON 18-12-2006, PASSED THE FOLLOWING:

K.A.ABDUL GAFOOR & K.R. UDAYABHANU, JJ.

R.C.R.NO.369 OF 2005

DATED THIS THE 18TH DAY OF DECEMBER 2006

ORDER

Udayabhanu, J.

The revision petitioner/tenant which is a company incorporated under the Companies Act has sought for setting aside the findings of the courts below allowing the application of the respondent/landlord under section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter to be called `the Act'). It is the case of the revision petitioner (hereinafter to be mentioned as `the tenant') that the concurrent findings of the courts below on the point are absolutely erroneous and misconceived.

2. The revision petition is filed over the orders in R.C.A.68/2004 which is the finding of the appellate authority affirming the decision of the Rent Control Court

in R.C.P. No.38/2003. The petitioners/landlords (hereinafter to be mentioned as the `petitioners') had sought for eviction of the petition scheduled premises under sections 11(2)(b), 11(3) and 11(4)(v) of the Act. The tenant company is engaged in the business of manufacturing and selling of rubber products, including tyres and the registered office of the company is at Calcutta and has got various branches and godowns in different parts of the country including the one housed in the petition scheduled premises. It is mentioned that the predecessor-in-interest of the petitioners had permitted the tenant to put up two structures in the property having an extent of one acre sixty cents and the tenant had put up two buildings having more than 15,000/- sq.ft.each and the petition scheduled premises is one of the above and having door No.36/1133. The tenant company suffered an economic crash which led to the invocation of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and the Board

for Industrial & Financial Reconstruction (`BIFR') declared the company as sick under the provisions of the 1985 Act in February, 1998 vide case No.14/98, In re.M/s.Dunlop India Ltd., scheme for revival and rehabilitation of the company was initiated. Appeal was also filed before the AAIFR i.e., the appellate authority as appeal No.1/2002 against the order of the BIFR. Meanwhile, the petitioners had initiated steps for eviction alleging rental arrears and bona fide need that the petitioners wanted to start a convention centre after making necessary alterations to the building and that the tenant has ceased to occupy the premises from September 2001. The petitioners had filed earlier RCP 45/99 and 146/99 with respect to the two structures invoking sections 11(2)(b), 11(3) and 11(4)(i) and (v) of the Act. Although the Rent Control Court allowed the above RCPs, the appellate authority reversed the findings. Hence, the present proceedings initiated is barred by the principles of res judicata and under section 15 of the Act.

3. It is further submitted that on account of the proceedings before the BIFR etc. the company could not maintain its office and godowns in the petition scheduled premises in full strength and only the bare minimum was engaged at the petition scheduled premises. On receipt of notice in the RCP, the tenant had entered appearance on 7-7-2003. The Rent Control Court had posted the case for filing counter on 12-8-2003. Meanwhile, the manager in charge of the tenant produced certain documents, including photostat copies of the mortgage deed executed by the petitioners and their predecessor in favour of the revision petitioner with respect to the property in which the building is situated. But the originals were not available as the same were kept in the registered office of the tenant company at Calcutta wherein the employees were on strike and they had prevented the management staff from entering into the office. The company had filed

W.P.no.505/2002 and other applications before the High court of Calcutta seeking police protection in order to retrieve the required documents. On account of the above situation, the tenant company could not file the counter even after 5 months of its appearance before the Rent Control Court. Although the same was brought into notice of the Rent Control Court vide I.A.8221/2003 and sought further time for filing objection, the Rent Control Court rejected the same and set the tenant ex parte. Hence, the company could not file the counter statement. The Rent control Court, without adverting to the facts and circumstances of the case, has allowed the application of the petitioners.

4. It is further contended that there was no cessation of occupation as a full fledged office and godown could not be maintained at the petition scheduled premises only on account of the proceedings before the BIFR and AAIFR. The

company had no intention to cease to occupy the premises. Even if there is cessation of occupation, it was on account of the statutory obligation of the tenant company as per the directions of the BIFR and AAIFR as per the scheme propounded under the Sick Industrial Companies (Special Provisions) Act, 1985. Right now, rehabilitation proceedings is almost over and the company will be operating in full swing in no time. It is further submitted that the courts below have relied on the ex parte report of the commissioner and that too without examining the commissioner. The commissioner has inspected the property without notice to the tenant. No attempt has been made by the commissioner to have the inside inspection of the petition scheduled premises. The Rent Control court has not provided sufficient and reasonable opportunity to the tenant to adduce evidence and refute the case set up by the petitioners. The finding that the power supply stood disconnected etc. is without any basis or material on

record. The two inspections by the commissioner were without notice to the tenant. The reasonableness of the cause for not conducting the business in the premises by the tenant was not considered by the courts below. It was also pointed out that not only the application filed for extension of time to file the counter statement was dismissed but the tenant was made ex parte and that the counsel for the tenant had no occasion or opportunity to cross examine the witnesses nor to contest the proceedings.

5. We find that the trial court has committed a serious procedural flaw in declaring the respondent/tenant ex parte in the proceedings, thereby rendering the tenant incapable to participate in the further proceedings of the matter. When the tenant was being represented by the counsel, it is extremely improper for the court below to declare the tenant ex parte. Hence, the tenant could not cross examine the witnesses examined on behalf of the

petitioners nor could the counsel for the tenant argue the matter before the trial court. The appellate court has not considered this aspect.

6. The Supreme Court has observed in **Sangram Singh v. Election Tribunal, Kotah** (AIR 1955 (SC) 425) that:

> the procedure [is] something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.
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> Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

In Modula India v. Kamakshya Singh Deo (AIR 1989

(SC) 162) the apex court has spelled out specifically that even if the defence is struck off, the same does not deprive the defendant from further participation in the case in any manner and that the defence would be entitled to cross examine the plaintiff's witnesses. However, when the defendant is afforded the aforesaid right he would not be entitled to lead any evidence of his own nor can have cross examination permitted to travel the very limited objective of pointing out the falsity or weakness of the plaintiff's case. In short there is nothing in law to preclude him from demonstrating to the court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute. It was further observed that it would be equally correct to say that the cross examination of the plaintiff's witnesses really constitute a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless

it is tested by cross examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross examination. The right of the defence to cross examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon.

7. More over, it is seen that the Rent control court as well as the appellate authority has extensively quoted from the report of the commissioner which is marked as Ext.C1 and relied on the same. The courts have also relied on the photographs taken at the instance of the commissioner. It has to be noticed that the commissioner inspected the premises without notice to the tenant. Further more, the commissioner was not examined. It is elementary that the ex parte commission report cannot be relied on without examining the commissioner. The commission report stands not proved.

8. Apart from the statements in the report of the commissioner, virtually, the evidence on behalf of the petitioners is the proof affidavit of the first petitioner wherein, the version in support of the ground under section 11(4)(v) are just the statements that from September 2001, the tenant is not occupying the premises

and that there is no special reason for the non occupation and that for a period of more than one year, the electricity is disconnected. We find that the above statement in the proof affidavit as such is hardly sufficient to sustain the case under section 11(4)(v). The basis of the finding under section 11(4)(v) is the recitals in the report of the commissioner and the photographs taken by him without notice to the tenant. The same cannot be relied in the absence of direct proof as to the truth of the recitals in the C.R.and as to the genuineness of the photographs. At least the commissioner ought to have been examined. We find that the above lapse knocks off the bottom of the decisions of the courts below. True, the revision petitioner/appellant has produced a number of documents with respect to the proceedings before the BIFR etc. but still the contention in the appeal memorandum before the appellate authority and before this Court is that the tenant was in occupation of the premises but with a skeleton staff. Hence, the production of

the documents relating to BIFR proceedings cannot as such be treated as having conceded that the tenant has ceased to occupy the premises. In the circumstances, we find that the decision of the Rent Control Court as well as that of the appellate authority opposed to the interests of the tenant are liable to be set aside and we do so. The finding as to bona fide need shall stand closed and not liable to be reopened. The Rent Control Court is directed to permit the tenant/respondent therein, to file counter statement and re-agitate the matter. The petitioners are also to be given opportunity to adduce further evidence in the matter. The entire proceedings before the Rent Control Court is directed to be completed within four months from the date of receipt of a copy of this order.

In the result, the rent control revision petition is allowed and the matter is remitted to the Rent Control court with the above directions. The parties shall appear before the Rent Control Court on 8-1-2007.

(K.A.ABDUL GAFOOR)
Judge

(K.R.UDAYABHANU)
Judge

kvm/-

K.A.ABDUL GAFOOR &
K.R.UDAYABHANU, JJ.

R.C.R.NO.369 OF 2005.

ORDER

Dated: